MALAYAN BANKING BHD

v.

KOH TIAN JOO & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HAMID SULTAN ABU BACKER J
[SUIT NO: D2-22-431-2007]
5 SEPTEMBER 2011

CONTRACT: *Building contract - Set-off - Main contractor agreed to pay plaintiff contract proceeds due to subcontractor without reservation - Subcontractor formally assigned proceeds to plaintiff - Main contractor signified acceptance on Notice of Assignment - No clause in subcontract letter of award or in assignment for main contractor to claim set-off against assigned proceeds - Whether main contractor could exercise set-off or withhold proceeds to defeat plaintiff's interests*

The fourth defendant was a developer of a project to build low-cost apartments and other relevant buildings. It awarded the building contract to a subcontractor named Westform Far East Sdn Bhd ('Westform'). By an irrevocable letter of instruction, Westform authorised the fourth defendant to remit all payments due to it under the building contract to the plaintiff. Westform then executed a notice of assignment with the plaintiff assigning absolutely to the latter all its rights, title and interest in the monies payable to it under the building contract. The fourth defendant also executed the document to agree to comply with the terms of the notice of assignment. Following an interim valuation of the work done by Westform (Interim Valuation No: 20), the plaintiff demanded from the fourth defendant the sum of RM19,108,051.18 and any other amount it owed Westform under the building contract. The plaintiff proceeded to file a claim in court for the same.

One of the main issues in this case was whether the fourth defendant, without informing the plaintiff and after mutually determining its final account with Westform arising from certain counterclaims that it had, was entitled to set-off and deduct a certain sum from the amount stated in Interim Valuation No: 20. Another issue was whether the fourth defendant could withhold

payments due to Westform under Interim Valuation No: 20 in priority over the plaintiff's right as assignee to full payment of the sum certified thereunder.

Held (allowing the claim with costs):

(1) The fourth defendant had agreed to pay the assignment proceeds without any reservation. The payment clauses in the letter of award issued by the fourth defendant to Westform did not permit it to claim any form of set-off. (para 10)

(2) Interim Valuation No: 20 obliged the fourth defendant to pay as provided by cl. 2.2 of the letter of award. (para 10)

(3) The fourth defendant's conduct of agreeing to pay the proceeds without any reservation of equities and thereafter quietly settling the accounts with Westform and asserting a right detrimental to the plaintiff's interests did not subscribe to commercial realities. (para 10)

(4) When the notice of assignment was given to the fourth defendant, it could have easily accepted to pay subject to set-off and that would have put the bank to notice of any shortcoming in the documentation or otherwise and accordingly protect its interest or mitigate its loss. (para 10)

Case(s) referred to:

Bachy Soletanche (Malaysia) Sdn Bhd v. Kin Hup Seng Construction Sdn Bhd [2001] 1 CLJ 549 HC ***(refd)***

Banco Central SA & Trevelan Navigation Inc v. Lingoss & Falce Ltd & BFI Line Ltd [1980] 2 Lloyds LR 266 ***(refd)***

Bank Bumiputra Malaysia Bhd Kuala Terengganu v. MAE Perkayuan Sdn Bhd & Ors [1993] 2 CLJ 495 ***(refd)***

Bekalan Sains P&C Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd [2010] 1 MLJ 329 ***(refd)***

Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd [2011] 6 CLJ 493 CA ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Bridgecon Engineering Sdn Bhd & Ors v. Uniphone Telecommunication Berhad [2011] 1 LNS 893 HC ***(refd)***

BP (Sabah) Sdn Bhd v. Sykt Jubrin Enterprise & Ors [1998] 5 CLJ 104 HC ***(refd)***

Bukit Cerakah Development Sdn Bhd v. L'Grande Development Sdn Bhd [2008] 2 CLJ 645 CA ***(refd)***

China Airlines Ltd v. Philips Hong Kong Ltd [2002] 3 SLR 367 ***(refd)***

Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (Trading as Rabobank International), Singapore Branch v. Motorola Electronics Pte Ltd [2010] 3 SLR 48 ***(refd)***

Feller Resources Sdn Bhd v. Contramec Sdn Bhd [2010] 1 LNS 66 HC ***(refd)***

Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd [2007] 3 CLJ 695 CA ***(refd)***

Hanak v. Green [1958] 2 QB 9 ***(refd)***

Hong Leong Bank Bhd v. Sum-Projects (Brothers) Sdn Bhd [2010] 7 CLJ 1010 HC ***(refd)***

Jetara Sdn Bhd v. Maju Holdings Sdn Bhd [2007] 3 CLJ 41 CA ***(refd)***

L'Grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd [2007] 8 CLJ 507 HC ***(refd)***

Lam Hong Hardware Co Sdn Bhd lwn. Incacon Sdn Bhd & Yang Lain [2006] 2 CLJ 1129; [2006] 4 CLJ 1150i CA ***(refd)***

Mae Engineering Ltd v. Dragages Singapore Pte Ltd (fka Dragages et Travaux Publics (S) Pte Ltd) [2002] 3 SLR 45 ***(refd)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***

Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***

Ribaru Bina Sdn Bhd & Anor v. Bakti Kausar Development Sdn Bhd & Anor [2007] 1 CLJ 552 CA ***(refd)***

Sabah Medical Center Sdn Bhd v. Syarikat Neptune Enterprise Sdn Bhd [2011] 1 LNS 849 HC ***(refd)***

Shamil Bank Bahrain v. Beximco Pharmaceuticals & Ors [2004] 2 Lloyd's Report 1 ***(refd)***

Sime Bank Bhd v. Kuala Lumpur City Securities Sdn Bhd [2001] 8 CLJ 689 HC ***(refd)***

Suncast Sdn Bhd (No Sykt 296921-W) v. Padang Indah Sdn Bhd (No Sykt 206187-A) [1999] 1 LNS 332 HC ***(refd)***

Thai Chee Ken & Ors (Liquidators of Pan-electric Industries Ltd) v. Banque Paribas [1993] 2 SLR 609 ***(refd)***

The Government Of Newfoundland v. The Newfoundland Railway Company & Ors [1888] 13 AC 199 ***(refd)***

The Investment Dar Company KSCC v. Blom Developments SNL [2009] EWHC 3545 ***(refd)***

UMW Industries (1985) Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 FC ***(refd)***

Uniphone Telecommunications Bhd v. Bridgecon Engineering Sdn Bhd & Anor [2011] 6 CLJ 189 CA ***(refd)***

United Malayan Banking Corporation Bhd v. Aluminex (M) Sdn Bhd (Receivers & Managers Appointed) & Anor [1994] 2 CLJ 188 SC ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Young v. Kitchin [1878] 3 Ex D 127 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)

Other source(s) referred to:
Sundra Rajoo, Davidson & Harbans, The PAM 2006 Standard Form of Building Contract, p 5
Ruzian Markom & Sharina Ali Pitchay, *Enforcement of Islamic Banking and Finance Laws in The Civil Courts of Malaysia [2010] 3 ShLR 42*

For the plaintiff - SY Ng (Brian Sim with him); M/s Raja Darryl & Loh
For 4th defendant - Belden; M/s Belden

Reported by Ashok Kumar

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiff's claim against the 4th defendant based on assignment of contract proceeds which is payable by the 4th defendant. And the prayers *inter alia* against the 4th defendant read as follows:

(a) a sum of RM19,108,051.18, and also any other amount owing and payable by the 4th defendant to Westform based on agreement and proven by *inter alia* the letter of offer dated 10 June 2004 (the said construction agreement); and

(b) interest on the sum of RM19,108,051.18 or other sum abovementioned based on the said construction agreement at the rate of 8% per annum from 2 February 2007 until the date of full settlement etc.

It must be noted that after the filing of the suit the 4th defendant has paid RM3,337,341 without prejudice.

[2] The issues to be determined in this case *inter alia* are:

(a) whether the 4th defendant can set-off etc, the payments due from the assignor over the plaintiff's rights as assignee; and

(b) whether the plaintiff as assignee is entitled to the sum stated in the Interim Valuation No. 20 issued by the quantity surveyor when it has to be by interim certificates by the superintending officer.

[3] The statement of agreed facts in encl. 45 *inter alia* reads as follows:

(a) the 4th defendant is a developer/contractor in regards to a project to develop low-cost apartments and other relevant buildings for Dewan Bandaraya Kuala Lumpur and Asis Sdn Bhd (the said project);

(b) pursuant to a letter of offer dated 10 June 2004 (the Building Contract), the 4th defendant had awarded to Westform Far East Sdn Bhd (Westform) as the subcontractor to perform building works in relation to the said project (see encl. 53, pp. 72 to 86);

(c) *vide* an assignment of contract proceeds which are contained and evidenced by *inter alia* the following:

(i) a letter by Westform dated 3 November 2004 (see encl. 53, p. 114); and

(ii) a notice of assignment cum irrevocable instruction dated 27 January 2005 (see encl. 53, p. 205).

(notice of assignment), Westform had assigned their rights to the plaintiff on the contract proceeds payable by the 4th defendant to Westform in respect of works performed in regards to the said Project.

(d) the notice of assignment was duly accepted by the 4th defendant on 29 January 2005 (see encl. 53, p. 206);

(e) an 'Interim Valuation No. 20' dated 22 March 2006 was issued by Kumpulan Sepakat Konsult in regards to the works performed by Westform pursuant to the said project as of 22 March 2006 pursuant to the Building Contract (see encl. 53, pp. 398 to 415);

(f) *vide* a letter dated 2 February 2007, the plaintiff's solicitors had demanded from the 4th defendant an amount of RM19,108,051.18 (see encl. 53, p. 431);

(g) *vide* the 4th defendant's letter dated 16 August 2007, the plaintiff received a payment in the amount of RM3,337,341 from the 4th defendant (see encl. 53, p. 454);

A (h) a final account dated 18 February 2008 was sent and executed by Westform with the 4th defendant on 18 February 2008 (see encl. 53, pp. 464 to 466).

[4] The issues to be tried which repeats the same problem with B different words in encl. 46 reads as follows:

(a) Whether Interim Valuation No. 20 dated 22 March 2006 (the "Interim Valuation No. 20") creates an obligation on the 4th defendant to pay Westform Far East Sdn Bhd ("Westform") under the construction contract dated 10 June C 2004 between the 4th defendant and Westform ("construction contract").

(b) Whether the plaintiff's rights as an assignee under the notice of assignment cum irrevocable instruction dated 27 January D 2005 ("the notice of assignment") between Westform and the plaintiff accrue upon the issuance of the Interim Valuation No. 20.

(c) Premised on:

E (i) Section 4(3) of the Civil Law Act 1956;

(ii) the letter from Westform to the 4th defendant dated 3 November 2004;

F (iii) the notice of assignment;

(iv) the construction contract and

(v) Interim Valuation No. 20,

G whether the 4th defendant is entitled to exercise any equities (including the right to withhold and set-off against payments due to Westform) in priority over the plaintiff's rights as assignee.

H (d) Accordingly, whether the plaintiff as assignee is entitled to the sum stated in Interim Valuation No. 20.

(e) Further whether the plaintiff is entitled to be paid the sum stated in Interim Valuation No. 20 in the event that the 4th defendant has a counterclaim against Westform.

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(f) Whether the 4th defendant's actions against Westform in: A

(i) issuing a certificate of non-completion dated 20 January 2006; and

(ii) reserving its right to impose, deduct and/or set-off liquidated damages amounting to RM20,000 per day on any further interim certificate payable to Westform; and B

creates an equity that has priority over the plaintiff's rights as assignee.

C

(g) Having terminated Westform on 21 June 2006 under the construction contract, whether the 4th defendant is entitled to withhold payment under Interim Valuation No. 20. claiming priority over the plaintiff's rights as assignee in the light of the 4th defendant's counterclaim against Westform. D

(i) Having regard to the final account dated 18 February 2008 agreed between the 4th defendant and Westform ("the Final Account"), whether the 4th defendant is entitled to exercise a set-off to deduct the sums under the Interim Valuation No. 20. E

(j) Whether the final account binds the plaintiff and the plaintiff's rights as assignee.

(k) Whether the 4th defendant is liable to the plaintiff the total sum claimed in this action being the balance sums not paid under the Interim Valuation No. 20. F

The Issues As Interpreted By The 4th Defendant Are:

(l) Premised on: G

(i) Section 4(3) of the Civil Law Act 1956;

(ii) the letter from Westform to the 4th defendant dated 3 November 2004; H

(iii) the notice of assignment cum irrevocable instruction issued by Westform dated 27 January 2005; and

(iv) the construction contract between the 4th defendant and Westform, I

A (m) is the 4th defendant entitled to exercise all equities (including the right to withhold and set-off against payments due to Westform) in priority over the rights of the plaintiff assignee?

(n) Is Interim Valuation No. 20 (as prepared by Kumpulan
B Sepakat Konsult on 22 March 2006) a certificate of payment, making any sums stated therein payable to Westform within the period of honouring certificates under the construction contract between the 4th defendant and Westform?

C (o) Accordingly, is the plaintiff assignee entitled to be paid any sum stated in Interim Valuation No. 20?

(p) Is the 4th defendant's action of:

(i) issuing a certificate of non-completion; and

D

(ii) reserving its right to impose, deduct and/or set-off liquidated damages amounting to RM20,000 per day on any further interim certificate payable to Westform,

an equity that has priority over the right asserted by the
E plaintiff under the assignment?

(q) Having terminated Westform's employment under the construction contract, is the 4th defendant's action of withholding payments due and payable to Westform a right
F that has priority over the plaintiff assignee's purported right to payment under Interim Valuation No. 20?

(r) Noting that Westform agreed in the final account dated 18 February 2008 to the deductions and set-off that arose from Westform's breaches under the construction contract, is
G the 4th defendant's action of setting-off or deducting such sums a right that has priority over the plaintiff assignee's purported right to payment under Interim Valuation No. 20?

[5] The parties have relied on the following cases: *United*
H *Malayan Banking Corporation Bhd v. Aluminex (M) Sdn Bhd (Receivers & Managers Appointed) & Anor* [1994] 2 CLJ 188; *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; *UMW Industries Sdn Bhd (Formerly UMW (Malaya) Sdn Bhd) v. Ah Fook @ Chin Kim Fook* [1996] 1 CLJ
I 379; *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib*

Bank Malaysia (Intervener) [1996] 3 CLJ 635; *BP (Sabah) Sdn Bhd v. Sykt Jubrin Enterprise & Ors* [1998] 5 CLJ 104; *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345; *Lam Hong Hardware Co Sdn Bhd lwn. Incacon Sdn Bhd & Yang Lain* [2006] 2 CLJ 1129; [2006] 4 CLJ 1150i; *Ribaru Bina Sdn Bhd & Anor v. Bakti Kausar Development Sdn Bhd & Anor* [2007] 1 CLJ 552; *Jetara Sdn Bhd v. Maju Holdings Sdn Bhd* [2007] 3 CLJ 41; *Mae Engineering Ltd v. Dragages Singapore Pte Ltd (fka Dragages et Travaux Publics (S) Pte Ltd)* [2002] 3 SLR 45; *L'Grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd* [2007] 8 CLJ 507; *Bukit Cerakah Development Sdn Bhd v. L'Grande Development Sdn Bhd* [2008] 2 CLJ 645; *Bridgecon Engineering Sdn Bhd & Ors v. Uniphone Telecommunication Bhd [2011] 1 LNS 893 (Suit No. D2-22-536-2001); Uniphone Telecommunications Bhd v. Bridgecon Engineering Sdn Bhd & Anor* [2011] 6 CLJ 189; *Feller Resources Sdn Bhd v. Contramec Sdn Bhd* [2010] 1 LNS 66; *Sabah Medical Center Sdn Bhd v. Syarikat Neptune Enterprise Sdn Bhd* [2011] 1 LNS 849 (Suit No. KK24-53-2011/KK24-62-2011); *Hong Leong Bank Bhd v. Sum-Projects (Brothers) Sdn Bhd* [2010] 7 CLJ 1010; *Bachy Soletanche (Malaysia) Sdn Bhd v. Kin Hup Seng Construction Sdn Bhd* [2001] 1 CLJ 549; *Suncast Sdn (No. Sykt 296921-W) v. Padang Indah Sdn Bhd (No. Sykt. 206187-A)* [1999] 1 LNS 332; *Young v. Kitchin (1878) 3 Ex D 127; Banco Central SA & Trevelan Navigation Inc v. Lingoss & Falce Ltd & BFI Line Ltd* [1980] 2 Lloyds LR 266; *The Government Of Newfoundland v. The Newfoundland Railway Company & Ors* (1888) 13 AC 199; *Hanak v. Green* [1958] 2 QB 9; *Sime Bank Bhd v. Kuala Lumpur City Securities Sdn Bhd* [2001] 8 CLJ 689; *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229.

Brief Facts

[6] The summary of the plaintiff's case and the defendants' case are found in encls. 51 and 47 respectively. The plaintiff's case is quite straight forward and difficulties arose because the 4th defendant having had the notice of the assignment, proceeded to settle with the assignor (Westform) after the contract was terminated without informing the plaintiff; on the basis they are entitled to do so pursuant to various contractual terms, with total disregard to the plaintiff's right which the plaintiff complains of in this suit.

A **[7]** The plaintiff's argument has been meticulously summarised by the learned counsel for the 4th defendant and it reads as follows:

(a) the plaintiff is not privy to the construction contract. Accordingly, the plaintiff is not bound by the terms of the
B construction contract and may ignore the terms of the construction contract altogether (see para. 10 of plaintiff's submission);

(b) the Interim Valuation No. 20 by the quantity surveyor is in essence a certification of payment due and outstanding and
C accordingly, the plaintiff's right to this sum crystallised on 22 March 2006 when Interim Valuation No. 20 was issued (see paras. 8, 8.1 and 31 of plaintiff's submission);

(c) alternatively, that the 4th defendant subsequently confirmed
D the value of work done stated in Interim Valuation No. 20 in the final account and since there is no dispute as to the value of the work done by Westform, the 4th defendant is not entitled to set-off any sums against the said value (see paras 22.2 and 23.2 plaintiff's submission);

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(d) the 4th defendant is duty bound to pay the amount stated in Interim Valuation No. 20 within 30 days of its issuance (see paras 8, 8.1 and 23 of plaintiff's submission);

F (e) the 4th defendant cannot deduct any sums from the assigned proceeds because the assigned proceeds were payable to the plaintiff before the termination of the construction contract (ie, payable when Interim Valuation No. 20 was issued on 22 March 2006) (see para. 9 of plaintiff's submission);

G (f) the 4th defendant having received notice of the assignment, is not at liberty to exercise any set-off against sums due and payable to Westform/plaintiff (see para. 20 of plaintiff's submission);

H (g) the 4th defendant does not enjoy any priority against the plaintiff because the 4th defendant's claim arose after the plaintiff's assignment had already come into existence (see para. 8.2 of plaintiff's submission);

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(h) Clause 30 of the PAM conditions of contract prohibits the 4th defendant from exercising any set-off on account of claims which have arisen subsequent to the certification of completed works (see paras. 28, 28.1, 30.3 and 48.2 of plaintiff's submission);

(i) there is no cl. in the construction contract permitting the 4th defendant to exercise set-off against the assigned proceeds (see para. 31 of plaintiff's submission);

(j) the 4th defendant's contention of having an equitable set-off against the assigned proceeds is erroneous and should not be allowed (see paras. 45 & 48 of plaintiff's submission);

(k) if the 4th defendant had any claims, the 4th defendant ought to pursue them *vide* an arbitration against Westform and not pre-emptively exercise set-off to recover these claims (see paras. 29, 31.3 and 50 of plaintiff's submission);

(l) final account was agreed to by Westform and the 4th defendant in the middle of arbitration. The final account agreement was too conveniently arranged to be believed and actuated by bad faith (see paras. 36 & 37.1 of plaintiff's submission); and

(m) there is no probative value in DW3's special audit report as DW3 could not verify whether the payments made were in fact required and necessary for the completion of the project (see para. 43.2 of plaintiff's submission).

[8] The 4th defendant's argument can be summarised as follows:

(a) The assignment between Westform and the plaintiff is subject to all equities which would have been entitled to in priority over the right of the plaintiff, as assignee;

(b) Westform had breached the contract and in consequence was terminated, and pursuant to Clause 25.4 of the contract (ie, PAM Standard Form Contract) which entitles the 4th defendant to complete the obligations of Westform and thereafter seek a valid set-off against Westform against their claim for work done;

(c) Section 4(3) of the Civil Law Act 1956 which the plaintiff relies on in respect of the assignment permits the set-off the 4th defendant has against Westform;

A (d) In addition the final account dated 18 February 2008 pursuant to Clause 30.7 of the PAM conditions settles the account in respect of the project. And the plaintiff's rights under the assignment are subject to the aforesaid final account; and

B

(e) It is not permissible for the plaintiff to rely on Interim Valuation No. 20 issued by the quantity surveyor as interim certificates (not valuation) must be issued by the architect/ superintending officer pursuant to cl. 30.1. PAM. The 4th
C defendant has also through their witness filed an audit report to justify the 4th defendant's defence and set-off in this action.

Preliminaries

D **[9]** One witness gave evidence for the plaintiff and three witnesses for the defendant including the accountant who prepared the audit report. Substantial part of the cross examination relating to the plaintiff was in relation to construction of various documentary terms, and not relating to the five senses
E of the witness, ie, what she saw or did etc, to attach probative value to the answers, to the problem in hand. The lengthy submissions of the parties were mere repetitions relating to contractual terms, rights and obligations; most of the paragraphs asserting the same issues over and over again, in different words.

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[10] I have heard the evidence, read the documents and submissions of the parties in detail. I am grateful to the submissions of the learned counsels who have dealt with the evidence and the law in detail. I do not wish to repeat the same,
G save to deal with the core issues. After having given much consideration to the submission of the learned counsel for the 4th defendant, I take the view that the plaintiff's claim (less amount received) must be allowed. My reasons *inter alia* are as follows:

H (a) in the instant case the 4th defendant has agreed to pay the assignment proceeds without any reservation (see encl. 53 pp. 114, 205 and 206),

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Enclosure 53, p. 114:

WESTFORM FAR EAST SDN BHD (Letterhead)

3rd November 2004

(RECEIVED
5 NOV 2004
MAYBANK
Seremban Business
Center

To: KEJURUTERAAN BINTAI
KINDENKO SDN BHD
(address)

Attn: Mr Tan Teng Khoon

Re: (Subject Matter)
IRREVOCABLE LETTER OF INSTRUCTION

We refer to the above and hereby authorised you to remit all the progress payments due to us under the Claim Certificates/Bills direct to MALAYAN BANKING BERHAD at its office in No. 166-169, Jalan Dato' Bandar Tunggal, 70000 Seremban, Negeri Sembilan for the Account of Westform Far East Sdn Bhd under the Account No. 5-05019-140761 as and when the same shall become due and payable in respect of the said contract.

Please be advised that this Letter of Instruction cannot be cancelled without prior consent from the above named branch of MALAYAN BANKING BERHAD.

Your prompt cooperation in this matter is highly appreciated. In the meantime, kindly acknowledge receipt by signing and returning the duplicate of this letter to us.

Yours sincerely,

(Chop of Westform Far East Sdn Bhd)
(Co No. 371416-P)

(Signature) (Signature) (Signature)
... ...

We hereby acknowledge receipt: (Chop of Kejuruteraan Bintai Kindenko Sdn Bhd) (89776 P)

Name: GOH KONG TENG

Position: Director

A Awarder/Company Rubber Stamp/Chop: Witnessed By (Signature)

Date: 4 Nov 2004 ...

Name & I/C no: 5163973

B Cc: MALAYAN BANKING BERHAD Ms Iswary Chelliah

Enclosure 53, pp. 205 and 206:

WESTFORM FAR EAST SDN BHD (Letterhead)

C NOTICE OF ASSIGNMENT CUM IRREVOCABLE INSTRUCTION

27th January 2005

To: KEJURUTERAAN BINTAI KINDENKO SDN BHD
D (address)

Dear Sirs,

Re : (Subject Matter)

E We hereby give you notice that by a deed of assignment dated 18th day of January 2005 made between ourselves and MALAYAN BANKING BERHAD (3813-K) ('the Lender'), we have assigned absolutely to the Lender all our present and future rights, title and interest in and to all sums of moneys due and payable by you to us under the above captioned contract ('the
F Proceeds'). We hereby authorise you to remit all the Proceeds to the Lender at its branch office at No. 166-169, Jalan Dato' Bandar Tunggal, 70000 Seremban for the credit of the account of 'Malayan Banking Berhad – Westform Far East Sdn Bhd', Account No. [50501914076-1] as and when the Proceeds shall
G become due and payable under the provisions of the Contract or to such other account as may be designated by the Lender.

Please also be advised that the instruction herein contained cannot be cancelled or revoked or varied without prior written consent from the Lender.

H

Kindly acknowledge receipt of this Notice cum Instruction and where applicable, endorse your consent by signing and dating the attached duplicate copy and return the same to us forthwith. Thank you.

I

Yours faithfully,

(Chop of Westform Far East Sdn Bhd)
(Co No. 371416-P)

(Signature) (Signature)
... ...

Name: TAN HUI KEN Name: KOH TIAN JOO
I/C No: 691210-01-5872 I/C No: 600919-01-5419
Date: 28/1/2005 Date: 28/1/2005

We, hereby acknowledge receipt of the above notice of assignment of the Proceeds in favour of Malayan Banking Berhad and agree to comply with the terms/instructions contained in the notice.

SIGNED by ANG LIANG KIM)
for and on behalf of KEJURUTERAAN BINTAI)
KINDENKO SDN BHD (89776-P)) (Signature)
On the 29th day of January, 2005) ...
In the presence of)

(Signature)
... ...
Name: Tan Teng Khoon (Chop and sign)
I/C No. 5163973 Date: 29-1-2005

(Chop of Kejuruteraan Bintai
Kindenko Sdn Bhd) (89776P)

It was led in evidence by the 4th defendant that in a similar assignment made in Singapore the plaintiff's bank has particularly stipulated to exclude set-off. The acknowledgement relating to the Singapore matter reads as follows:

> We undertake not to make any deductions, exercise any rights of set-off or make any counterclaims in respect of payment to be made to us.

(see encl. 67, p. 22, para. 76).

In consequence the 4th defendant says the fact that a similar undertaking was not incorporated in the acknowledgment the 4th defendant signed in respect of the notice of assignment, only shows the 4th defendant is not prevented from exercising its contractual right of set-off as against any proceeds. I do

A not find much merit in this line of argument taking into consideration various terms of the relevant documents and in particular the letter of award (encl. 53 p. 72), payment terms to Westform by the 4th defendant in cls. 2.2 and 2.3 which say as follows:

B

2 Contract Sum and Payment Term

2.2 Payment Term:

The terms of payment shall be as follow:

C

i. Piling works: RM1,850,000.00 by monthly progress claims with 10% retention to a limit of 5% of contract sum for this portion of work.

ii. Building works: RM25,600,000.00 by Bank Guarantee subject to 2 1/2% retention sum.

D

Both retention sum shall be released as per terms of contract.

In the case of termination of contract for whatsoever reason, outstanding payment to be paid on the certified value of work done carried out by the S.O. up to the date of termination.

E

2.3 Any additional or omission work or variation works resulted *[sic]* in the adjustment of the contract value or the guaranteed amount shall be dealt with separately in progress payment certification.

F

If the intention of the 4th defendant is clear as to rights relating to set-off, they will have clearly stated so. It must be noted the letter of award was issued by the 4th defendant. In addition the *contra proferentum* rule will support the contention to say there was no right to set-off, as per the letter of award. Once the contract is terminated the outstanding payment becomes due and payable. In saying so I am mindful of the fact that the PAM agreement and conditions of building contract is part of the contract relating to the award. In particular cl. 25.4(iv) which states:

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25 Determination by Employer

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25.4 (iv) The Contractor shall allow or pay to the Employer in the manner hereinafter appearing the amount of loss caused to the Employer by the determination. Until after the completion of the works under sub-

clause 25.4 (i), the Employer shall not be bound by any provision in this contract to make any further payment to the Contractor, but upon such completion and verification of the accounts within a reasonable time the Architect shall certify the amount of expense properly and actually incurred by the Employer and the amount of any loss caused to the Employer by the determination and, if such amounts added to the monies paid to the Contractor before the date of determination exceed the total amount which would have been payable on completion in accordance with this Contract, the difference shall be a debt payable to the Employer by the Contractor, and if the said amounts when added to the said monies be less than the said total amount, the difference shall be a debt payable by the Employer to the Contractor.

Paragraph 25.4(iv) clearly talks about further payment. Further payment will usually arise when payment for work is based on interim certificates. This is not contract based on interim certificates neither was any payment given based on interim certificate relating to the assignment. In the instant case it is an agreed term that the payment obligation of the 4th defendant will only arise upon the completion of the project and the issuance of practical completion, which the parties refer to as one-bullet payment. Thus, 25.4(iv) will not apply in the instant case as the issue of further payment does not arise as no payment was made to Westform before the termination of the contract based on interim certificates. In addition cls. 2.2 and 2.3 set out in clear terms how payment obligation ought to be settled and that provisions do not permit the 4th defendant to claim any form of set-off.

(b) The learned counsel for the 4th defendant asserted that s. 4(3) of the Civil Law Act 1956 is subject to a set-off. That section reads as follows:

4. Administration of insolvent estates, and winding up of companies.

(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor,

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> trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

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In my view cls. 2.2 and 2.3 do not create any form of equities in favour of the 4th defendant and cl. 25.4(iv) in relation to set-off will not be applicable to the factual matrix of the case.

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In saying so I am mindful of the arguments raised by the 4th defendant, relating to assignment, equitable assignment, statutory assignments, set-off, contractual set-off, tripartite set-off agreement etc. Most of these issues were discussed in detail in the Singapore case of *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (Trading as Rabobank International), Singapore Branch v. Motorola Electronics Pte Ltd* [2010] 3 SLR 48 where the court *inter alia* on the facts held:

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(i) The agreement did not exist as an assignment *per se* but was an agreement to assign. The assignor offered debts for the assignee to purchase. If the assignor chose to purchase, the acceptance of the offer constituted the act that assigned the debt. One key requirement of a statutory assignment was for the assignment to be absolute. This required an immediate transfer of the assignor's entire interest in the chose in action, and a mere agreement to assign could not achieve that. Since no notice of assignment had been given to the debtor, each acceptance constituted an equitable assignment.

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(ii) In both equitable and statutory assignments, the giving of notice to the debtor was crucial. The notice of assignment fixed the rights of the parties in relation to the debtor's countervailing rights, primarily the right to set-off its debts against debts owed by the assignor to the debtor.

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(iii) A set-off agreement could be inferred from the parties' conduct, (*Commercial Factors Ltd v. Maxwell Printing Ltd* [1994]1 NZLR 724 and *Latreefers Inc (In Liquidation) v Tangent Shipping Co Ltd* [2000] BCLC 805). Here, there

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was no evidence of an express tripartite set-off agreement between JHTI, MTC and the defendant. However, based on the totality of the evidence presented, there was more than sufficient evidence to imply a tripartite contractual set-off agreement, and that there had been set-off exercised on 22 October 2008 and 21 November 2008 pursuant to this set-off agreement. The plaintiff had no claim on the invoices numbered 99075199, 90075207 and 90075249 as those related to purchase orders of MTC, and were unrelated to the defendant.

(iv) In the absence of a party's insolvency, the requirement of mutuality for set-off could be overridden by the existence of a contractual set-off agreement (*Latreefers Inc (In Liquidation) v. Tangent Shipping Co Ltd* [2000] BCLC 805).

(v) It was well settled that an assignee took subject to equities that existed prior to the notice of assignment being given to the debtor; the assignee took the chose in action as it was and could not obtain a better position than the assignor. The assignee took subject to a contractual set-off agreement provided that the agreement was made prior to the notice of assignment being given to the debtor; see *Roxburghe v. Cox* [1881] 17 Ch D 520.

(vi) In the present case, the equitable assignment had been perfected into a statutory assignment when the written notification was received by the defendant on 25 November 2008. Prior thereto, no valid notice of the equitable assignment had been given to the defendant. The authorities on the validity of a notice of assignment presupposed that the relevant assigned debt had to first have been sufficiently identified. The telephone conversation between Richard and Pauline on 11 November 2008 was mainly to enquire who the notification of assignment should be given to, where they had touched generally on the receivables due. As there were hundreds of invoices involved between the defendant and JHTI, the general information that some invoices had been assigned to the plaintiff did not constitute a valid notice of assignment as it left the debtor (the defendant) none the wiser as to which invoices had been assigned. On the facts, the requisite notice of assignment was given on 25 November 2008 when the defendant received the plaintiff's letter dated 17 November 2008.

(vii) Even if the telephone conversation on 11 November had constituted adequate notice of assignment, the plaintiff would have taken the assignment subject to the defendant's right of set-off because the relevant choses in action under the assignment had already accrued prior to the notice of assignment. Where a debt accrued prior to the notice of assignment, and there was a pre-existing agreement to set-off the debt, the assignee took subject to the equity which was the agreement to set-off the accrued debt, even if the actual debit of the debt took place after the notice of assignment; see *Watson v. Mid Wales Railway Co* (1867) LR 2 CP 593; *Business Computers Ltd v. Anglo-African Leasing Ltd* [1977] 1 WLR 578: at [102] to [106].

The factual matrix of the instant case is such that no issue of set-off arises at all, to consider the defendant's arguments on set-off, assignment etc.

(c) It is the contention of the 4th defendant that Interim Valuation No. 20 is not an interim certificate, as envisaged in PAM contract cl. 30.1. Again I have to say this, that PAM contract is a standard form of contract and in its general terms cater for cases where payment is made based on interim certificate. Clauses 30.1 to 30.3(ii) read as follows:

30.0 Certificates and Payment

30.1 Certificates to be issued by the Architect under these Conditions shall be issued to the Contractor with a copy to the Employer. The Architect may, by any certificate correct any error or discrepancy which has been discovered in any previous certificate, or may modify any previous certificate, other than a Certificate of Practical Completion or the Final Certificate, which has been issued by him.

30.2 During the Period of Interim Certificates stated in the Appendix, the Contractor shall submit details and particulars to the Architect, sufficient for the Architect to consider and ascertain the amount to be stated in an Interim Certificate. Upon receipt of the Contractor's details and particulars, the Architect shall issue an Interim Certificate to the Contractor with a copy to the Employer and the Contractor shall be entitled to payment thereafter within the Period of Honouring Certificates stated in the Appendix. Provided always that the Architect shall have

the discretion to make interim valuations whenever he considers necessary for ascertaining the amount to be stated as due in an Interim Certificate.

30.3 The amount stated as due in an Interim Certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and where the Contractor had paid to the supplier the full cost of the materials and goods delivered to or adjacent to the Works for use thereon up to and including a date not more than seven (7) days before the date of the said certificate less any amount which may be retained by the Employer (as provided in Clause 30.4) and less any instalments previously certified under the Conditions. The certificate shall only include the value of the said materials and goods from such time as they are reasonably, properly and not prematurely brought to or placed adjacent to the Works and then only if adequately protected against weather or other casualties.

30.3 (i) Unless otherwise expressly provided in these Conditions, the Employer shall not be entitled to withhold or deduct any amount certified as due under any Architect's certificates by reason of any claims to set-off or counterclaims or allegation of defective works, materials or goods or for any other reasons whatsoever which he may purport to excuse him from making payments of the amount stated to be due in an Interim Certificate.

30.3(ii) In the event of any disputes or differences as to any rights of the Employer to set-off or to any counterclaims or any allegation of defective works, materials or goods or for any other reasons then such disputes or differences shall be referred to an arbitrator for judgment under Clause 34.0.

The factual matrix of the instant case is not one related to interim payments and in consequence I do not think it is correct to rely on standard form contracts to accommodate the defendant's arguments where terms have not been specifically provided for to reflect the true intention of the parties. The learned authors, Sundra Rajoo, Davidson and Harbans, in the book titled '*The PAM 2006 Standard Form of Building Contract*' make this pertinent observation at p. 5:

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> Therefore, any standard form of building contract would need to appreciate and incorporate all the special requirements and circumstances that a project would call for, particularly the required work, the price to pay and the other terms under which the contract is to be performed, settled and disputed.

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And at p. 6:

> It would be therefore be useful in expressing the obligations of the parties and setting out with reasonable clarity the scope of the projects. It is based on the perceived good sense of providing for the problems which experience has taught in the course of construction contracts. Precision in drafting of the contract is critical to the avoidance of disputes.

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D (d) In the instant case there was no agreement for interim payments but only one-bullet payment. In consequence I do not see how cl. 30 or for that matter, many other standard clauses will assist the 4th defendant.

E (e) In the instant case at relevant stage of work interim valuation, as opposed to interim certificate, has been issued and this has never been objected to by the 4th defendant. After the termination the most relevant interim valuation is that of Interim Valuation No. 20 which the plaintiff relies on. And this Interim Valuation No. 20 obliges the 4th defendant to pay as provided by cl. 2.2. of the letter of award, even though there was no interim certificate and the 4th defendant also did not provide an interim certificate upon termination or objected to the amount of work done at the material time.

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G (f) The 4th defendant's reliance of final account in the instant case has no probative value taking into consideration the factual matrix of the case and the right of the 4th defendant to pay the plaintiff the proceeds upon the termination of the contract. In addition I must say justice encompasses not only law, but equity and good conscience. The 4th defendant's conduct of agreeing to pay the proceeds without any reservation of equities and thereafter quietly settling the accounts with Westform and asserting a right, detrimental to the plaintiff's interest does not subscribe to commercial realities; the convenient label as advocated by courts in

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banking matters. The label may also come in various terms, such as business efficacy, customs etc. This concept of commercial realities have moved away from the common law position of merely interpreting the cold and naked terms of the law or contractual terms to give meaningful conclusion to the attainment of justice in support of commercial transactions according to the justice of the case. This emerging doctrine has been advocated in various ways to fit the facts of the case. To name a few are as follows:

(i) In *Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd* [2011] 6 CLJ 493, the Court of Appeal on the facts of the case *inter alia* observed:

> That the shareholders' agreement dated 5 May 2006 must be interpreted by applying the objective approach and that the language employed must be read so as to give way to a business common sense approach bearing in mind the commercial reality of the matter.

(ii) In *Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 3 CLJ 695 Gopal Sri Ram JCA (as he then was), on the facts of the case *inter alia*, observed:

> In the absence of a clearly worded provision in a hire-purchase agreement imposing such an obligation, the courts should not do so as it does not accord with commercial reality that a finance provider in a hire-purchase transaction involving an imported car should be made to undertake such an onerous obligation.

(iii) In *Thai Chee Ken & Ors (Liquidators of Pan-electric Industries Ltd) v. Banque Paribas* [1993] 2 SLR 609, Yong Pung How CJ on the facts of the case made the following observation:

> Moreover, the court ought to take notice of the constant development of new financing arrangements and should not be strapped by precedents based on arrangements which are outmoded in topicality. Each case must be seen in its own particular circumstances and commercial reality.

(iv) In *China Airlines Ltd v. Philips Hong Kong Ltd* [2002] 3 SLR 367, Chao Hick Tin JA quoted:

> We find a common feature in these cases: it is a recognition of the commercial reality that, if a plaintiff is permitted to sue the carrier's agents or servants to recover the full extent of his loss, the carrier would indirectly have to be responsible for such losses through the provision of indemnities to its agents or servants acting in furtherance of the contract of air carriage. This would be contrary to one of the main objects of the Warsaw Convention, that is, to protect air carriers from claims beyond the prescribed limits.

In addition there are a number of Islamic Banking cases where the apex court had upheld transactions which are perceived to be void or unenforceable based on illegality, common law, statutes or Islamic jurisprudence or even equity. The cases have been well documented by Ruzian Markom and Sharina Ali Pitchay in their enlightening article titled '*Enforcement of Islamic Banking and Finance Laws in The Civil Courts of Malaysia*' [2010] 3 ShLR 42. The trend of courts will appear to be to lean in favour of the banks to uphold the transactions which are in approved mode to ensure lending institutions are not made bankrupt by borrowers or its like as such failure will directly affect the economic well-being of the country. The noble philosophy may not strictly find support in law or jurisprudence as it was known 50 years ago but now it can be conveniently couched as commercial reality and reasonable expectation, to save the transaction with a view to save the Islamic Banking Industry. Similar overtures in Islamic Banking jurisprudence in a limited sense are also reflected in other jurisdiction (see *Shamil Bank Bahrain v. Beximco Pharmaceuticals & Ors* [2004] 2 Lloyd's Report 1; *The Investment Dar Company KSCC v. Blom Developments SNL* [2009] EWHC 3545 (Ch)). I must say here that an adverse decision of the court on standard transaction closely regulated by the Central Bank which is widely accepted in the industry may affect the industry as a whole which may affect the economy and may not be just limited to the case in hand; may appear to be a good reason to 'save the transaction'. Taking the lead from the apex decision in Islamic Banking cases, I will say at least in conventional banking when parties deal with a bank in a lending transaction or its' like, the legitimate expectation of the bank to recover must not be defeated within the parameters of commercial reality and reasonable

expectation. A person who intends or has reasonable prospect to resist payment for some reason or other should disclose to the bank at the earliest opportunity to put the bank to notice to the shortcoming of the transaction or the proposed transaction. In the instant case where the notice of assignment was given to the 4th defendant, the 4th defendant could have easily accepted to pay subject to set-off and that would have put the bank to notice of any shortcomings in the documentation or otherwise and accordingly protect its interest or to mitigate its loss. Propagating ambiguous rights or contractual terms against the bank's interest may not easily succeed within the Malaysian jurisprudence unless the apex court wants to condone the same, on case by case basis. In consequence those who deal with the banks must be aware of the emerging doctrine and in my view borrowers or its' like must not act to defeat the banks' interest in surreptitious manner. The courts are more inclined to act against the bank when the bank has done a wrong to the borrowers or its' like, and not in a case where the borrowers or its' like attempt to evade liability such as in the instant case (see *Bekalan Sains P&C Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd* [2010] 1 MLJ 329; *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. MAE Perkayuan Sdn Bhd & Ors* [1993] 2 CLJ 495).

[11] For reasons stated above, the plaintiff's claim is allowed less the sum received as stated above at the interest rate of 4% per annum. The parties to settle the order before the deputy registrar. The 4th defendant to pay costs in the sum of RM100,000. The plaintiff to pay the allocatur fees. The order for costs may be extracted upon the payment of allocatur. The deputy registrar to issue the certificate for the allocatur.

I hereby order so.